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In the Supreme Court of the United States

OCTOBER TERM, 1985

THE REVEREND JAMES O. MOTE, *et al.*,

Petitioners,

v.

THE BISHOP AND DIOCESE OF COLORADO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether in holding that the secessionist majority of a local parish of the Episcopal Church was not entitled also to withdraw the local church's property, the Colorado Supreme Court acted in accordance with the First Amendment and with Jones v. Wolf, where the Colorado Supreme Court:

> (1) adopted and applied the neutral principles of law doctrine approved in *Jones v. Wolf*; and
>
> (2) applied specifically the principles of Colorado trust law, based on detailed and undisputed factual findings.

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JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

This case arose in the Fall of 1976, when a dissident majority of the members of St. Mary's Church, Denver, seceded from the general or parent church with which St. Mary's had been affiliated for almost 45 years, the Protestant Episcopal Church in the United States of America (known generally and referred to herein as "the Episcopal Church," or as "PECUSA," or the "parent church"). The issue in the courts below was whether the withdrawing majority was entitled also to withdraw the church property, or whether rightful control of that property was instead vested in the Episcopal Church or in the minority of the St. Mary's

parishioners who had remained within the Episcopal Church. The petitioners, who are representatives of the secessionist majority, argued below that this issue of control should be decided under "neutral principles" of state corporate and property law. The Colorado Supreme Court did so, applying Colorado trust law to conclude that a trust had been imposed on the property of St. Mary's Church for the use of the Episcopal Church. (Pet. App. 83a).

All of the courts below based their legal conclusions on undisputed facts. The original incorporators of St. Mary's Church had specified in their Affidavit of Incorporation that they had "unanimously decided to organize as a Protestant Episcopal Church under the Diocese of Colorado . . ." (Pet. App. 37a). The Diocese of Colorado is a subordinate unit of PECUSA and is presided over by a Bishop, who is both its chief ecclesiastical authority and the chief executive officer of its corporate entity. The Diocese has a legislative and policy making body known as the Annual Convention and an executive body, the Diocesan Executive Council, which has the responsibility to carry out the policies and programs of the Annual Convention and has broad responsibility over financial and property matters in the Diocese. (Pet. App. 38a).

In 1954, the membership of St. Mary's Church, which began as a small Episcopal "mission," formally applied for parish status. In doing so, St. Mary's unanimously adopted a resolution acceding to the Constitutions both of the national church and of the Diocese, recognizing the authority of PECUSA, and promising obedience to the canons of PECUSA and the Diocese. (Pet. App. 38a). In its corporate bylaws also adopted in 1954, St. Mary's declared that "'nothing shall be done which conflicts with the canons of the Church, either General or Diocesan." (Pet.-App. 39a). The Diocesan canons provided, among other things, that church buildings could be opened only for purposes authorized by the Bishop and by the Episcopal Church and for no other purposes. (Pet. App. 17a).

In 1955, the year after it became a parish, St. Mary's requested and received the required consent of the Diocese to revise completely its own Articles of Incorporation. The revised articles contain specific provisions acceding to the laws of the Diocese and of PECUSA. The amended articles state, among other things, that "the objects and purposes for which said parish is incorporated are to administer the temporalities [i.e. properties and revenues] of the Protestant Episcopal Church in the parish," and that "the corporation may not incur indebtedness which may alienate or encumber church property without the consent in writing of the Diocese of Colorado . . ." (Pet. App. 7a, 38a). Thereafter, when St. Mary's burdened its real property in connection with construction loans or purchases of other property, it submitted to the Diocese formal applications for consent to encumber. (Pet. App. 8a).

In September of 1976, the Episcopal Church approved the ordination of women to the priesthood. (Pet. App. 39a). Two months later, at the Annual Convention of the Diocese of Colorado, a majority of the members of the St. Mary's delegation walked out when the Convention rejected the delegation's resolution protesting the ordination of women and other actions taken by PECUSA. *(ibid.)*

On November 28, 1976, at a meeting at St. Mary's, the members voted 197 to 79 to withdraw from PECUSA and to amend the St. Mary's Articles of Incorporation by deleting all provisions recognizing the authority of PECUSA and of the Diocese. *(ibid.)* The Bishop of the Diocese of Colorado attempted to attend this meeting, but was physically barred at St. Mary's by members of the dissident group. Afterwards, the secessionist majority changed the locks on the doors of the church and posted off-duty Denver policemen as guards. (Pet. App. 10a).

When the withdrawing majority then refused requests and demands to surrender possession of the property, the Diocese and the group of St. Mary's parishioners who had chosen to remain within PECUSA filed suit in Denver District Court. They sought recovery of possession of the property of St. Mary's held by the secessionists. In the trial court, respondents presented evidence

and argued legal theories both of the "polity" doctrine and under Colorado trust and contract law. (Pet. App. 68a). The trial court chose to apply the "polity" analysis, enforcing the prior determination by the appropriate governing body of the Episcopal Church recognizing the loyal minority as the group entitled to control and possession of the property held by St. Mary's. (Pet.-App. 41a-42a).

The trial court's factual findings (Pet. App. 3a-21a) also set forth concretely the "detailed and largely undisputed facts of the history of the role played by St. Mary's Church and its members in the Diocese from the time of the founding of St. Mary's as a mission in the early 1930's until the time of the dispute which gave rise to this litigation." (Pet. App. 18a). Based on all the evidence presented, the trial court concluded, and found as a fact, that in the Diocese of Colorado, "[a]lienation, encumbrance and use of the property of an incorporated parish are not committed to the independent control of the parish." (Pet. App.14a). The trial court then entered judgment granting control of the property to the loyal minority of St. Mary's.

The Colorado Court of Appeals reversed, after adopting a "presumptive rule of majority representation," by which it examined the record only to determine whether an express trust over the property held by St. Mary's Church had been created in favor of the general church. (Pet. App. 42a).

The Colorado Supreme Court granted certiorari. That Court agreed with the Court of Appeals that there should be applied to church property disputes in Colorado the neutral principles approach of *Jones v. Wolf*.[1] The Court declined, however, to adopt a "presumptive rule of majority representation," such as had been implemented by the Georgia Supreme Court in *Jones*. Rather, the Colorado Supreme Court looked to "established principles of statutory and common law traditionally applied to determine who has legal control over any particular corporation

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[1]443 U.S. 595 (1979), *on remand*, 244 Ga. 388, 260 S.E. 2d 84, *cert. denied*, 444 U.S. 1080 (1980).

or voluntary association and how freely or extensively that control can be exercised." (Pet. App. 62a). The Colorado Supreme Court then held that under Colorado trust law, no particular language need be used to create a trust or to manifest the intention to create a trust, and that therefore there was no need under Colorado law to restrict the inquiry to a search for explicit language of express trust. (Pet. App. 63a-64a). The Colorado Supreme Court reviewed the undisputed facts of record and concluded in a unanimous opinion[2] that "on these particular facts, a trust has been imposed on the real and personal property held by St. Mary's Church for the use of the general church." (Pet. App. 83a).

Petitioners filed a petition for rehearing in the Colorado Supreme Court, urging among other things that the Court's holding was inconsistent with prior Colorado trust law. On February 24, 1986, the petition for rehearing was denied, without dissent. (Pet. App. 84a).

ARGUMENT

I. NO NOVEL OR SUBSTANTIAL QUESTION DISTINGUISHES THIS CASE, WHICH FALLS SQUARELY WITHIN THE PRINCIPLES ESTABLISHED BY THIS COURT IN *JONES V. WOLF*

In *Jones v. Wolf*, this Court reaffirmed "neutral principles of law" as an appropriate method for resolving church property disputes. The Court emphasized that this approach was consistent with First Amendment constraints prohibiting civil courts "from resolving church property disputes on the basis of religious doctrine and practice," while accomodating also the important principle that the First Amendment "does not dictate that a state

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[2]Justice Kirshbaum, who had been a member of the panel of the Colorado Court of Appeals when the lawsuit was before that Court, did not participate.

must follow a particular method of resolving church property disputes." 443 U.S. at 603. The Court quoted with approval the statement of Justice Brennan in the *Sharpsburg* case that a "state may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith."[3]

In resolving the dispute over the church property at St. Mary's, the Colorado Supreme Court adopted and applied the neutral principles analysis, within the specific framework of relevant Colorado law. (Pet. App. 55a, 60a-67a). In Part I of their Brief, however, petitioners contend that review should be granted in this case because, allegedly, the Colorado Supreme Court "misapplied" the neutral principles analysis. (Pet. 11). The sole contention advanced by petitioners in support of this proposition is that under *Jones v. Wolf*, in resolving a church property dispute a state court purportedly should be forbidden to accord significance to any evidence or question other than whether "language of trust and property law familiar to lawyers and judges . . . clearly reflected an intent of the parties to create a trust over local church property in the event of the local church's disaffiliation from the denomination." (Pet. 18-19). This contention misconstrues both *Jones v. Wolf* and the opinion of the Colorado Supreme Court. The rule it advocates would implicate new and more difficult problems in the quest for constitutional neutrality in church property law.

In the first place, the rule that petitioners would propose effectively abandons the key principle of flexibility which was reaffirmed in *Jones v. Wolf*. The Court there stressed that the "primary advantages of the neutral principles approach are that it is completely secular in operation, and yet flexible enough to accomodate all forms of religious organization and polity." 443

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[3]*Maryland & Virginia Eldership of the Church of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring) (emphasis in original).

U.S. at 604. The Court observed also that the neutral principles doctrine "shares the peculiar genius of private law systems in general — flexibility in ordering private rights and obligations to reflect the intentions of the parties." *(ibid.)*

The Court had before it in *Jones v. Wolf*, a particular version of the neutral principles analysis which had evolved in Georgia, and which in that State required a civil court as one part of resolving church property disputes to examine certain documents for language of trust in favor of the general church. 443 U.S. at 605. The Court nowhere held that it would be appropriate or even constitutionally permissible either to require every state to adopt Georgia's approach or to restrict the analysis in every church property dispute to a search for language of express trust directed to the contingency of disaffiliation. On the contrary, as desribed in *Jones v. Wolf*, "neutral principles" is a comprehensive doctrine which mandates no specific rule or formula, but rather commends the resolution of church property disputes through objective, well established principles of secular law, including principles of contract, corporate and property law. 443 U.S. at 603.

By contrast, the rule which petitioners advocate would arbitrarily preclude recourse to any other relevant neutral principle from the law of property, contracts or corporations. Petitioners maintain that their approach is needed in order to prevent state courts from somehow manipulating *Jones v. Wolf* in the service of "their particular view of church doctrine." (Pet. App. 2a). Petitioners cite no instance, however, where this has actually happened. Moreover, petitioners never attempt to explain by what reliable criteria appellate courts could be expected to decide whether the "language of trust and property law" in any particular case is sufficiently "familiar" to lawyers and judges. Nor do petitioners attempt to justify, under the First Amendment principles reviewed in *Jones v. Wolf*, a test that would erase from the analytic framework for church property disputes most of the doctrines and sources of relevant law regularly available to civil courts in controversies involving the property of secular entities.

In addition to failing to show why neutral principles under *Jones v. Wolf* ought now to be narrowed or redefined, petitioners also fail to demonstrate that the Colorado Supreme Court actually "ventured into the forbidden area of church polity and practice." (Pet. 15). The *facts* which the Colorado Supreme Court relied upon in applying Colorado trust law were undisputed facts, either as found by the trial court or as stipulated to by the parties. (Pet.-App. 37a). The trial court, for example, found *as a fact* that:

> "Alienation, encumbrance and use of the property of an incorporated parish [in the Diocese of Colorado] are not committed to the independent control of the parish."

(Pet. App. 14a).

The key provisions in the relevant documentary evidence, which petitioners now purport to find unacceptably "ecclesiastical," were not the subject of any conflict, let alone any doctrinal conflict, as to their meaning. As the trial court observed: "*It is undisputed* that these documents contain provisions which affect the right of ownership and use of church property. . . . *No dispute has arisen* in this case as to the meaning of these provisions; nor would the Court in any event resolve such a dispute." (Pet. App. 17a; emphasis supplied).

Nor do the selected facts or items of trial evidence highlighted by petitioners (Pet. 11-13) actually reflect any transgression by the Colorado Supreme Court into constitutionally "forbidden" areas. The first four of these items required neither consideration of religious precepts nor resolution of doctrinal issues (undisputed and uncontradicted evidence in the St. Mary's Articles of Incorporation and by-laws regarding promises of accession by the local church to the laws of the parent church; undisputed acknowledgement by St. Mary's of its status as a local unit with the national church; express acknowledgement by the St. Mary's Church corporation that St. Mary's could do nothing which would conflict with the laws of the parent church; and uncontested evidence as to the historical role of St. Mary's Church in the Diocese of Colorado)

Petitioners also suggest that the Colorado Supreme Court was improperly influenced by "doctrine" when it took into account the fact that the St. Mary's Church Articles of Incorporation provided that St. Mary's was incorporated in order to administer the real property of the parent church, including the real property titled in St. Mary's Church. (Pet. App. 71a). In the courts below, however, there was not any controversy as to the meaning of that provision. Petitioners now attempt to describe this provision as if it concerned only such property as was used "to carry on religious work." (Pet. 12). That limitation is not imposed by the Articles of Incorporation, and it has not previously been asserted by petitioners. (Pet. App. 88a). If anything, therefore, this is an example not of religious "entanglement" in the opinion or analysis of the Colorado Supreme Court, but of a recent confusion or misreading of the evidence by petitioners.

Similarly, petitioners now maintain that the Colorado Supreme Court improperly took into account a Diocesan canon related to control over church buildings. (Pet. 12). Petitioners say that such buildings could be opened "only for services, rites and ceremonies as are authorized or sanctioned by PECUSA or the Bishop Ordinary." *(ibid.)* This description does indeed make it appear as if the provision applied strictly to religious or "ecclesiastical" uses of the church property. The actual language of the provision cited by the Colorado Supreme Court states comprehensively, however, that church buildings may be opened for "all services, rites, ceremonies, *or other purposes,* authorized or sanctioned by [the Episcopal Church] *and for none other purposes. . . .*" (Pet. 77). Again, the description of this item of evidence by petitioners exemplifies not a religious entanglement within the facts reviewed by the Colorado Supreme Court, but an apparent misimpression by petitioners themselves as to the existence of an "entanglement," or else an attempt to construct one.

What is actually before this Court, as opposed to petitioners' assertions of a forbidden passage from "the secular to the non-secular," is a concrete and detailed factual record established in the trial court, based upon stipulations and undisputed evidence,

not challenged by petitioners in the courts below, and properly taken into account by the Colorado Supreme Court. The Colorado Supreme Court has applied Colorado trust law to that evidence, and in doing so has acted well within the parameters of the First Amendment and of this Court's analysis in *Jones v. Wolf*.

II. DIFFERING OUTCOMES IN THE STATE COURTS CITED BY PETITIONERS PRESENT NOT A "CONFLICT" TO BE ADDRESSED BY NEW AND MORE RIGID RULES FOR RESOLVING CHURCH PROPERTY DISPUTES, BUT A NATURAL AND CONSTITUTIONALLY CORRECT RESULT OF THE FLEXIBLE NEUTRAL PRINCIPLES APPROACH

Petitioners contend that review should be granted in this case because the lower courts are purportedly "in conflict and confusion concerning the neutral principles analysis of *Jones v. Wolf*." (Pet. 20). Respondents strongly believe that petitioners have failed to show the existence of the "conflict and confusion" which they assert.

It is certainly correct that as compared with the so-called "polity doctrine" or "rule of compulsory deference" set forth in *Watson v. Jones*,[4] the neutral principles approach does not prescribe a precise recipe or method for the lower courts to follow in resolving every church property controversy. Under *Jones v. Wolf* and the line of "neutral principles" cases which preceeded *Jones*, such disputes may be decided on the basis of "the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions of the constitution of the general church concerning the ownership and control of church property," 443 U.S. at 604. The neutral principles analysis thus not only permits but surely contemplates, at least to some extent, differing results in different

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[4] 80 U.S. (13 Wall.) 679 (1871).

states, depending upon: (1) the specific form of neutral principles analysis implemented (whether "rebuttable presumption," state statute, or the common law of trust, or property or corporations); (2) the nature of the factual record in each controversy; and (3) the substantive content of the state law relevant to the particular dispute.

In *Jones v. Wolf*, this Court took note that the application of neutral principles would not be free of difficulty, 443 U.S. at 605, but concluded that:

> "On balance, however, the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application. These problems, in addition, should be gradually eliminated as recognition is given to the obligation of 'States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.' *Presbyterian Church I*, 393 U.S. at 449, 89 S.Ct., at 606."

443 U.S. at 605.

Where church property disputes are to be decided on the basis of the same constitutionally neutral statutes or common law principles applicable to secular corporations or voluntary associations, it is not surprising that generally similar controversies confronting different state courts will sometimes yield different outcomes, depending upon differing state law or different elements in the factual background. It is this consequence, rather than any fundamental "conflict" of interpretation which is responsible for the results in the lower court decisions cited by petitioners. Petitioners say, for example, that in *Babcock Memorial Presbyterian Church v. The Presbytery of Baltimore*, 296 Md. 573, 464 A.2d 1008 (1983), *cert. denied*, 465 U.S. 1027 (1984), the Court of Appeals of Maryland based its decision on the denomination's

Book of Order but thereby purportedly reached a result "in conflict" with that reached by other courts on the same evidence. (Pet. 22-23). In the first place, although the Maryland Court of Appeals concluded that the Book of Order was not consistent with the claims of control made by the local church, it expressly referenced as "more important" the fact that the local church corporation "lacked power under Maryland corporation law" to make the disposition of property at issue in that case. 446 A.2d at 1017.

Petitioners cite the case of *Foss v. Dykstra*, 342 N.W.2d 220 (S.D. 1983) as an instance of a "contrary" holding regarding the effect of the Presbyterian Book of Order. (Pet. 23). Actually, the Supreme Court of South Dakota rests its decision in that case not on any one item of evidence but on a combination of facts which together demonstrated that the parent church did not control the property in question (local church articles reference no denominational affiliation; amended articles of incorporation mention no affiliation; mortgage instruments recognize right of local church to withdraw; property mortgage does not mention parent church; local church's articles state purpose of incorporation is for usage of local church). 342 N.W.2d at 222-224.

Similarly, in *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465 (Mo. 1984), *cert. denied*, 105 S.Ct. 2361 (1985), a case repeatedly cited by petitioners as manifesting a "conflict" over what may constitute a trust relationship, the Supreme Court of Missouri cites not merely the Book of Order but multiple facts showing control by the local church (historical control had "always" been exercised by the local church; national church not mentioned in documents related to encumbrances of local church property; national church loaned money to local church but received only defeasible security interest) 668 S.W.2d at 473. Both *Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal. App. 3d 910, 152 Cal. Rptr. 854, *cert. denied*, 444 U.S. 974 (1979) and *First Presbyterian Church of Schenectady v. Presbyterian Church in the United States of Am.*, 62 N.Y.2d 110, 464 N.E.2d 454, 476 N.Y.S.2d 86, *cert. denied*, 105 S.Ct. 514 (1984), also involved not just consideration of the "Book of

Order" but a review of a particular complex of facts persuasive to those lower courts on the issue of local versus parent church control.[5]

In sum, respondents submit that while there are predictable variations in the state court decisions applying differing versions of the neutral principles analysis, such differences are an entirely proper result of an approach specifically designed to incorporate the flexibility mandated by the First Amendment.

CONCLUSION

The Colorado Supreme Court carefully and correctly implemented in this case the neutral principles analysis. The Court determined that under Colorado trust law and based upon undisputed facts, "an intent on the part of the local church corporation to dedicate its property irrevocably for the purposes of PECUSA was expressed *unambiguously* in the combination of the 1955 Articles of Incorporation, the local church by-laws, and the canons of the general church, to which the local church acceded in its Articles at the time this dispute arose in 1976." (Pet. App. 70a-71a; emphasis added). Petitioners have shown no fundamental respect in which the decision of the Colorado Supreme Court, or the method of decision of that Court, either requires reversal or merits review. It is respectfully submitted that the Petition should be denied.

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[5]In *Presbytery of Riverside*, the local church had demonstrated, and the trial court had taken into account, a long history of operation as a *non*-denominational, community church. 152 Cal. Rptr. at 157. In *First Presbyterian Church*, the New York Court of Appeals focused on the fact that the local church had chosed *not* to bring itself within a state statute providing for parent church control over disputed property. 476 N.Y.S.2d at 93, 94-95.

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